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SUPREME COURT U. S.

Supreme Court of the United States

No. 205—October Term, 1904.

EDWARD JASTER, Sr., Plaintiff in Error,
vs.
F. M. CURRIE, Defendant in Error.

PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now F. M. Currie, the defendant in error herein, and petitions this honorable court for a rehearing of the above entitled cause for the following reasons and grounds, towit:

1. The point upon which the case was decided was not fully presented by the briefs of the parties.

It was contended in defendant's brief that the only federal question involved in the case is "can fraud in procuring the judgment of a sister state be pleaded as a defense to an action brought thereon?; that the question of whether the facts pleaded in the defendant's answer constituted fraud, is a question of general law and the decision of the state court thereon is conclusive. Relying on the well-settled rule of this court that only the federal question involved will be reviewed in a case on error to a state court, the question of whether the acts of plaintiff pleaded in the answer and admitted by the demurrer were sufficient to constitute fraud, was simply referred to as not requiring argument, and the brief was devoted to the questions of whether admitted fraud was a proper defense to the action and whether the decision in Christmas v. Russel, 5 Wallace, 290, was applicable. This court, in its opinion, decided, or assumed, that defendant's position on the questions last above referred to, is correct, but reversed the case upon a point but slightly considered in the brief of either party.

2. The court erred in holding that there was no misrepresentation, express or implied, by plaintiff, and, therefore no fraud pleaded.

By service of notice to take deposition, the plaintiff clearly

made the following implied representations, towit: That the purpose and object of serving said notice were (a) to enable plaintiff to take the testimony of a witness to be used in evidence in the suit pending; and (b) to give defendant an opportunity to cross-examine said witness. These implied representations were as strong and positive as if made in express words included in the notice. Defendant had a right to rely and act on them. The taking of a deposition is a part of the proceedings in the trial of a case and the defendant had the right to be present and cross-examine the witness. It is admitted by the demurrer that the defendant did rely and act on said representations and went to Ohio for the sole and only purpose of being present at the taking of said deposition.

The following allegations in the answer,

"That said notice to take said depositions of the said Edward Jaster, Sr., was simply a ruse and was given for the purpose of misleading and enducing and enticing this defendant to go to the said county of Trumbull and within the jurisdiction of the court of common pleas of Trumbull county, Ohio, for the fraudulent purpose of attempting to get service in said state of Ohio upon this defendant and for no other purpose" (record P. 19), which are admitted by the demurrer, show conclusively that the above implied representations were wilfully false. It is clear that if plaintiff's only purpose or reason in serving said notice was to entice defendant into Ohio to procure service of summons on him, as admitted, his object could not have been to enable plaintiff to take testimony to use as evidence, or to give the defendant an opportunity to cross-examine the witness.

This identical question was decided by the supreme court of Missouri in Peel v. Jnanury, 35 Ark. 331, in an action on a judgment obtained in Missouri. The plaintiff in that case first commenced an action in Arkansas and served notice on the defendant that a deposition would be taken in Missouri. Defendant went to Missouri in response to said notice to be present and cross-examine the witness. Plaintiff then begun a suit on the same cause of action in Missouri, served summons on defendant and dismissed the case in Arkansas. Defendant failed to appear and judgment was obtained against him by default. Afterwards an action was brought on said judgment in Arkansas. The defendant pleaded the foregoing facts in his answer, and the court held they constituted fraud. The following is an excerpt from the opinion in said case.

"Taking the allegations of the answer to be true, as admitted by demurrer, the personal presence of appellant within the jurisdiction of the circuit court of St. Louis, and the service of process on him there, were obtained by a fraudulent contrivance of appellees.

"True, he went there voluntarily, but if induced to go there by a false notice—a notice intended to bring him there for the purpose of serving him with process, and not designed in good faith to afford him an opportunity to cross-examine witnesses, it was a fraud upon the jurisdiction of the St. Louis circuit court."

The fact that the service of notice to take deposition would have been lawful if done for the object and purpose impliedly represented by the plaintiff, or the fact that the defendant went to Ohio voluntarily, should not excuse the deceit of plaintiff by which his unlawful purpose was accomplished. Such has been the universal holding of the state courts where such question has arisen.

In each of the following cases, towit: Dunlap v. Cody, 31 Ia. 260; Toof v. Foley, 87 Ia. 8; Wood v. Wood, 78 Ky. 628; Pilcher v. Graham, 18 O. C. R. 5; Abercrombie v. Abercrombie, 67 Pac. 539, pages 14 to 20, cited and quoted in defendant's brief filed herein, the plaintiff was guilty of acts which were perfectly lawful had it not been for the concealed object and purpose with which they were done and by which defendant was induced to voluntarily go into another state where service of process was made upon him. But the court held, in every one of said cases, that such acts constituted fraud which would avoid the judgment obtained on such service.

3. The immediate and expected effect of the service of said notice was to obtain an unlawful advantage over defendant to his damage, and the court erred in holding otherwise.

Ordinary prudence and regard for defendant's interest demanded that he be present at the taking of testimony which might materially affect the result of his case, and see that the witness was properly cross-examined. Plaintiff understood and recognized this and expected that defendant would exercise such ordinary prudence and come to Ohio in response to said notice, all of which is clearly shown by his admission that his only purpose and reason for serving said notice was to induce

defendant to come there, so that plaintiff might get service on him.

The right of defendant to have a case brought against him tried in the county and state where he lives is a legal and valuable one. First, because he is more apt to obtain justice where his character and reputation are known; and, second, because the inconvenience and expense to him of litigating the case at a distance of 1000 miles from his home, would be greatly enhanced. The plaintiff in this case knew this and undertook to deprive the defendant of such valuable legal right by his representations which he admits were false. To say that the law sanctions or permits a plaintiff to accomplish such an object by means admitedly employed in this case, would be a reproach the upon justice. We feel that if such question can be properly presented to, and fully considered by this court, on rehearing it must arrive at the conclusion that the supreme court of Nebraska was right in holding that the plaintiff's demurrer to the answer was properly overruled and that its judgment should be affirmed.

Defendant, therefore, prays that he be granted a rehearing in this case.

F. M. CURRIE.
By E. J. CLEMENTS, his attorney.

I hereby certify that, in my opinion, the foregoing petition for a rehearing, is well founded in point of law, and that a full presentation and consideration on rehearing, of the point on which this case was decided, should cause the court to reach a different conclusion than that stated in its opinion.

E. J. Clements

Counsel for Defendant in Error.